UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	ED CV 18-356-AB (SPx) ED CV 18-357-AB (SPx)	Date	September 26, 2019
Title	Sleep Number Corporation v. Sizewise Rentals, LLC Sleep Number Corporation v. American National Manufacturing, Inc.		

Present: The Honorable	Sheri Pym, United States Magistrate Judge	
Kimberly Carter	None	None
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:	
None Present	None Present	

Proceedings: **(In Chambers) Order Granting Plaintiff's Ex Parte Application to Modify Protective Order But Ordering Redactions to Private Source Code Information**

On September 23, 2019, plaintiff Sleep Number Corporation filed an ex parte application (docket no. 175 in case no. ED CV 18-356; docket no. 171 in case no. ED CV 18-357) asking the court to modify the stipulated protective order previously entered in these cases. Plaintiff's application is supported by the declaration of plaintiff's counsel Lukas D. Toft ("Toft Decl.") and exhibits thereto. On September 24, 2019, defendants Sizewise Rentals, LLC and American National Manufacturing, Inc. filed an opposition to plaintiff's ex parte application. Defendants' opposition is supported by the declaration of defense counsel Kyle L. Elliott ("Elliott Decl.") and exhibits thereto.

Plaintiff previously filed an ex parte application seeking the same relief from the court. The court denied this initial application without prejudice on the ground that it was not clear if the Magistrate Judge could rule on the application while the case remained stayed per an order entered by the District Judge. On September 23, 2019, the District Judge lifted the stay to allow plaintiff to seek modification of the stipulated protective order.

Based on the parties' written submissions, the court grants plaintiff's ex parte application to modify the protective order, but orders redactions to private source code

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I. BACKGROUND

Plaintiff Sleep Number is a corporation that designs, manufactures, and sells adjustable air mattress systems. Plaintiff holds U.S. Patent Nos. 5,904,172 ("the '172 patent"), 9,737,154 ("the '154 patent"), and 8,769,747 ("the '747 patent") for technology that adjusts the pressure in an air mattress system, and related components. Defendant Sizewise Rentals is a limited liability company that distributes and leases medical air bed systems. Defendant American National Manufacturing is a corporation that manufactures and sells consumer and medical air bed systems.

On March 23, 2018, plaintiff filed the operative First Amended Complaint ("FAC") alleging defendants are infringing its '172, '154, and '747 patents by making, using, selling, offering for sale, and/or importing certain air mattress systems into the United States. Among other counterclaims, defendants allege plaintiff's patents are invalid and unenforceable due to inequitable conduct.

In December 2018, defendants filed petitions for inter partes review ("IPR") with the U.S. Patent Trial & Appeal Board ("PTAB"). In these IPR proceedings, defendants seek to invalidate all or a portion of plaintiff's three patents. After PTAB assigned filing dates to the petitions, the parties filed a joint stipulation to stay the cases pending the resolution of the IPR proceedings. On February 12, 2019, the District Judge issued a stay of both cases with the exception of matters related to defendants' counterclaims of inequitable conduct. PTAB instituted IPRs for the '747 and '154 patents on July 24, 2019, and for the '172 patent on August 5, 2019.

On September 12, 2019, plaintiff filed motions for additional discovery in the IPR proceedings seeking information about defendants' sales and revenues. In these motions, plaintiff seeks the following information: (1) an identification of defendants' products that embody an "Accused Air Controller" or "Accused Source Code" and, for the sake of comparison, those that do not; (2) information about the number of units sold and revenues therefrom; (3) information about the distributors and retailers of such products; and (4) information about the differentiating features of such products. *See* Toft Decl.,

district court litigation to PTAB. App. at 1-4. Plaintiff maintains this information is relevant to evaluating commercial success, which is a secondary indicia of non-obviousness that is relevant to the validity of its patents. *Id.*

During a September 5, 2019 conference call with PTAB about plaintiff's motions, plaintiff argued some limited financial data was already produced in the district court action, but additional discovery is necessary to obtain information about defendants' units sold, profit margin, and other data relevant to the commercial success of its products. *See* Toft Decl Ex. 5 ("PTAB Transcript") at 15:3-22; 16:9-22; 17:1-6; 18:1-9. Plaintiff also stated on the call that it would seek modification of the protective order so that it could produce its infringement contentions to PTAB, which include references to protected source code. *Id*. at 14:1-14.

On September 11, 2019, PTAB issued an order noting that plaintiff's proposed discovery requests appeared overly broad, and urged plaintiff to consider narrowing its requests. *See* Toft Decl., Ex. 1 at 3. PTAB also advised the parties that "where Sleep Number was already in possession of certain sales information in the district court litigation, it should request a modification of the protective order from the district court in order to use that information in these proceedings." *Id.*

Plaintiff now seeks to modify the protective order previously entered in this litigation so that the term "action" includes the ongoing IPR proceedings, and plaintiff is allowed to use documents already produced in the IPR proceedings as long as it adheres to the protective order. Although plaintiff's motion for additional discovery provides context to plaintiff's application to modify the protective order, the court notes that plaintiff's discovery motion is pending before PTAB, not this court. Accordingly, the court will not address the merits of plaintiff's underlying motion for additional discovery.

II. DISCUSSION

A. The Court Will Consider This Motion on an Ex Parte Basis

the moving party must, at a minimum, show: (1) its "cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures"; and (2) "the moving party is without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect." *Id.* at 492.

Here, plaintiff has shown sufficient justification for ex parte relief. Although defendants filed IPR petitions in December 2018 and served these petitions on plaintiff in a timely manner, PTAB did not institute proceedings for the '747 and '154 patents until July 24, 2019, and for the '172 patent until August 5, 2019. App. at 2. The parties then requested a conference call with PTAB via email on August 16 and August 20, 2019, and held such call on September 5, 2019. Toft Decl., Ex. 1 at 2. In an order issued on September 11, 2019, PTAB authorized plaintiff to file a motion for additional discovery, and plaintiff did so on September 12, 2019. *Id.* Plaintiff first filed this ex parte application on September 12, 2019, as well.

Defendants argue the ex parte nature of the instant application is due to plaintiff's neglect or gamesmanship, and that plaintiff did not seek to modify the protective order during the nine months it had notice of the IPR petitions. Opp. at 1, 4-6. Additionally, defendants argue plaintiff's ex parte application is aimed at creating tactical advantage by forcing defendants to respond in multiple forums, and plaintiff has failed to give notice to a third party whose privacy rights are currently protected by the protective order. *Id.* at 5. Yet, as plaintiff notes, there was no reason for plaintiff to seek modification of the protective order unless and until PTAB issued a decision instituting IPR, and it was possible that PTAB could have denied all of defendants' petitions. App. at 3. Plaintiff also states it will be prejudiced if the modification is not granted because it will be unable to produce documents supporting its various PTAB filings, such as its pending discovery motions and patent owner responses. *Id.* at 8-12.

The court sees no indication of gamesmanship or attempting to create tactical advantage on plaintiff's part, especially given the expedited timeline of the IPR proceedings, and the fact that the parties were involved in simultaneous proceedings even before the instant dispute arose. As for defendant's argument that third-party privacy

B. Plaintiff Did Not Waive Its Right to Modify the Protective Order

Defendants argue waiver and estoppel apply because plaintiff negotiated and agreed to the stipulated protective order after being put on notice of defendants' intent to file IPRs. Opp. at 6-8. According to defendants, plaintiff was put on notice of defendants' intent to file IPRs as early as the first scheduling conference, and by agreeing to a stipulated protective order that prohibited using any confidential information outside of the district court action, waived its right to subsequently modify the protective order. *Id.* The court finds no indication any such waiver occurred merely by the parties stipulating to a protective order. Indeed, the protective order expressly states that "[n]othing in this Order abridges the right of any person to seek its modification by the Court in the future." Docket no. 69 at 24.

C. Good Cause Exists to Modify the Protective Order

"[D]istrict courts have inherent authority to grant a motion to modify a protective order where 'good cause' is shown. *CBS Interactive, Inc. v. Etilize, Inc.*, 257 F.R.D. 195, 201 (N.D. Cal. 2009) (citing *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002)). The party seeking modification must demonstrate that specific prejudice or harm will result if the motion is not granted. *Phillips*, 307 F.3d at 1210-11. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (citation omitted).

Plaintiff argues modification of the protective order is necessary for the following reasons: (1) the documents that have already been produced in the district court action are directly relevant to the issues in the IPR proceedings; and (2) the documents will support why PTAB should grant plaintiff's discovery motion by providing PTAB with more context about the need for additional discovery. App. at 8-12. Plaintiff further argues it needs the disclosures to support its patent owner responses, which are due to PTAB in October. *Id.* at 5. More specifically, plaintiff argues documents about defendants' financial information such as sales and revenue are relevant to proving the non-

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